WTO DISPUTE ANALYSIS*

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

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Reports of the Panel

UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM

(WT/DS429/R)
(Circulated on November 17, 2014) [1]

Parties:

Complainant:	Viet Nam
Respondent:	United States
Third Parties:	China, Ecuador, EU, Japan, Norway, Thailand

Panelists:

Mr. Simon Farbenbloom (Chairperson), Mr. Adrian Makuc (Member), Mr. Abd El Rahman Ezz El Din Fawzy (Member)

I. BACKGROUND

The dispute was with respect to anti-dumping measures imposed by the United States in the context of the US anti-dumping proceedings on *Certain Frozen Warmwater Shrimp from Viet Nam* (hereinafter "*Shrimp*") as well as with respect to certain US laws and US Department of Commerce ("USDOC") methodologies and practices.

Anti-Dumping Investigation

The USDOC had initiated its *Shrimp* investigation in January 2004 and issued an anti-dumping order in February 2005. At the time of these Panel proceedings, it had completed seven administrative reviews and

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**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

[1] The Panels issued these Reports in the form of a single document constituting two separate Panel reports WT/DS412/R and WT/DS426/R

conducted a first sunset review in which it determined that revocation of the anti-dumping duty order would likely to lead to the continuation or recurrence of dumping. (Para 2.1-2.4)

In the *Shrimp* proceedings, because Viet Nam was designated by the USDOC as a nonmarket economy ("NME"), the USDOC applied a rebuttable presumption that all companies within Viet Nam are essentially operating units of a single government-wide entity and, thus, should receive a single anti-dumping duty rate (the "Viet Nam-wide entity rate"). Vietnamese producers/exporters had to pass a "separate rate test" to receive a rate that was separate from the Viet Nam-wide entity rate. Those producers/exporters that did not establish that they were separate from the Viet Nam-wide entity received the Viet Nam-wide entity rate. (Para 2.5)

Viet Nam made claims with respect to the USDOC's final determinations in the fourth, fifth and sixth administrative reviews. Viet Nam's claims regarding these three administrative reviews concern: (i) the use of zeroing in the calculation of dumping margins; (ii) the rate that was assigned to certain Vietnamese producers who did not demonstrate sufficient independence from government control and thus were deemed by the USDOC to be part of the so-called "Viet Nam-wide entity"; and (iii) the USDOC's failure to revoke the anti-dumping order with respect to certain respondent Vietnamese producers/exporters. (Para 2.9)

Moreover, Viet Nam also made claims with respect to the USDOC's likelihood-of-dumping determination in the context of the sunset review. In addition, Viet Nam made "as such" claims with respect to: (i) the USDOC's "simple zeroing methodology" as applied in administrative reviews; (ii) the USDOC's practice with respect to the rate that is assigned to certain producers/exporters who do not demonstrate sufficient independence from government control (the "NME-wide entity rate") in anti-dumping proceedings involving imports from NMEs; and (iii) section 129(c)(1) of the US Uruguay Round Agreements Act ("URAA"). (Para 2.10)

Vietnam raised claims under Article 6.8, 6.10, 9.2, 9.3, 9,.4, 11.1, 11.2, 11.3, 17.6, 18.1 of AD Agreement and Article VI:2 of GATT.

II. KEY ISSUES AND PANEL FINDINGS

A. Preliminary Ruling

US submitted to the Panel a request for preliminary rulings, wherein it asked the Panel to find that certain measures and claims referenced in Viet Nam's Panel request were not properly within the Panel's terms of reference. Specifically, (i) the sixth administrative review, as it was not listed as a measure at issue in Viet Nam's request for consultations; (ii) the "use of zeroing in original investigations, new shipper reviews and changed circumstances reviews", as they were not listed in Viet Nam's request for consultations; (iii) the claim set forth in Viet Nam's panel request under Article 31 of the Vienna Convention, as the Vienna Convention is not a covered agreement; and(iv) the claim set forth in Viet Nam's Panel request relating to the US Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, because the SAA does not have any legal effect independent of an applicable US statute or regulation and is thus not a measure susceptible to dispute resolution. (Para 1.9, 7.13)

On 26 September 2013, the Panel issued a Preliminary Ruling addressing the US request. In its Preliminary Ruling, the Panel dismissed the US request to find that the sixth administrative review is outside its terms of reference. The Panel declined to make any findings with respect to the three remaining objections raised by the US, in light of Viet Nam's indication that it was not pursuing the corresponding claims. (Para 1.10, 7.16)

B. Substantive Claims

1. AD Agreement Article 9.3 and GATT Article VI: 2: Zeroing and Administrative Review

Viet Nam claim was with respect to zeroing "as such" and "as applied" in the fourth, fifth and sixth administrative review under AD Agreement Article 9.3 and GATT Article VI:2 with respect to the USDOC's "simple zeroing" methodology in administrative reviews. Viet Nam alleged that the USDOC, when calculating dumping margins on the basis of a comparison of a weighted-average normal value to individual export transactions, disregarded negative comparison results (those for which the individual export transaction price exceeds the weighted-average normal value) (Para 7.17-7.18)

"As Such" Claims

The Panel first established the existence of Zeroing methodology. Upon satisfaction it decided to evaluate the parties' arguments regarding the WTO-consistency of that measure. (Para 7.21)

(***Key Question:*** *When, and under what conditions, an unwritten rule or norm may be challenged "as such"?)*

The Panel identified that neither the DSU nor the AD Agreement established criteria for determining when measures could be challenged "as such". Following the guidance of past decisions, in order to meet the burden of proof, the Panel considered whether Viet Nam had established: (i) that the zeroing methodology is "attributable" to the US, (ii) the "precise content" of the zeroing methodology, and (iii) that the zeroing methodology does have "general and prospective application". (Para 7.20-7.35)

The US did not contest that Viet Nam had established the content of the zeroing methodology, and that the methodology is attributable to the US. Turning to the "**general and prospective application**" Viet Nam argued that findings of Panels and the AB in previous disputes were sufficient to establish the existence of the zeroing methodology and that the US had the burden of demonstrating that the Panel's factual findings and the conclusions in *US – Shrimp (Viet Nam)* with respect to the WTO-inconsistency of this methodology, which the US did not appeal, are in error. The Panel referred to AB report in *US-Japan (Zeroing)* and Panel in *US – Shrimp (Viet Nam)* to recall that **"factual findings in previous decisions do not relieve a complainant of the burden of establishing the facts in a subsequent dispute"** (Para 7.37-7.42)

In addition to factual findings Viet Nam relied on evidence to show that the zeroing methodology was used in administrative reviews one to six of the *Shrimp* order. US did not contest that zeroing was used in the reviews four to six, further indicating that it "does not dispute that a number of the dumping margins derived in the original investigation and in the first three administrative reviews were calculated using the so-called "zeroing' methodology." Second, Viet Nam provided the Panel with evidence indicating that the USDOC applies zeroing in anti-dumping proceedings in the nature of an affidavit from Ms Anya Naschak discussing the USDOC's use of zeroing in the three administrative reviews at issue. The US did not contest the contents of the affidavit. (Para 7.43-7.44)

US however asserted that the facts in this dispute are different from the facts in the *US – Shrimp (Viet Nam)* dispute because, effective April 2012, the USDOC changed its practice for calculating dumping margins in administrative reviews in response to AB findings, and now "grants offsets for non-dumped comparisons (i.e., does calculations without the 'zeroing' methodology) in various types of proceedings", including administrative reviews. In support of its assertion, US submitted the Notice of Final Modification in which the USDOC announced that it was modifying its calculation methodology in support of its assertion. Further it submitted that since April 2012, it had issued "numerous determinations" under other anti-dumping orders. Viet Nam didn't dispute or contest the submission; however it did contend that despite the Final Modification and the fact that zeroing was not used in the seventh administrative review of the *Shrimp* order, "the USDOC's zeroing methodology still exists as a

measure that can be challenged 'as such'". Vietnam argued that panels routinely make rulings on measures that have been modified or repealed. (Para 7.45-7.47)

The Panel found Viet Nam's arguments to be somewhat self-contradictory. The Panel noted that USDOC had modified its methodology following adverse rulings and inconsistency both "as such" and "as applied". As of Viet Nam's request for establishment of Panel for zeroing methodology, as used by the USDOC in administrative reviews, the Panel concluded that it does not exist as a measure of general and prospective application. In any event, the Panel was not convinced that the zeroing methodology "[could] be easily re-imposed" by the USDOC. Viet Nam provided no evidence indicating that the USDOC intended to revert to old methodology. (Para 7.48 – 7.54)

The Panel concluded that Viet Nam had failed to establish the existence of the alleged measure (simple zeroing methodology used by the USDOC in administrative reviews) as a rule or norm of general and prospective application. Consequently, the Panel did not consider the parties' arguments concerning the consistency of the alleged measure with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. **Therefore, Panel found that Viet Nam did not establish that the USDOC's simple zeroing methodology in administrative reviews was inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.**

"As Applied" Claims

Pursuant to Viet Nam's requests to find that the application of the zeroing methodology to calculate dumping margins for the individually-examined respondents in the fourth, fifth and sixth administrative reviews as inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, Viet Nam had to demonstrate that the USDOC applied zeroing in the three administrative reviews at issue. (Para 7.57-7.58)

Viet Nam relied on the affidavit as noted in the previous sections and the Issues and Decision Memorandum that accompaned USDOC's final determinations in the three administrative reviews in question. The Panel recalled that when a party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party who must adduce sufficient evidence to rebut the presumption. The US did not provide arguments or evidence to rebut the presumption raised by Viet Nam. Thus Panel concluded that Viet Nam has demonstrated that the USDOC applied simple zeroing in the calculation of margins of dumping of individually-investigated respondents in the fourth, fifth and sixth administrative reviews. (Para 7.61-7.64)

The Panel next considered the consistency of the application of this methodology with Articles 9.3 AD Agreement and VI:2 GATT. Viet Nam submitted that Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 explicitly provide that margins of dumping may not be greater than the margin of dumping for the product as a whole. Article 9.3 of the Anti-Dumping Agreement reads, in relevant parts:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

Article VI:2 of the GATT 1994 provides as follows:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

*(**Key Question:** Whether the term "margin of dumping" referred to in both provisions must be calculated for the "product as a whole", as argued by Viet Nam, or whether it may be calculated on a transaction-specific basis, as submitted by the US?)*

The Panel invoked prior disputes to find that the AB had clarified, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, it is only on the basis of aggregating all these intermediate values that the investigating authority can establish margins of dumping for the product as a whole. The Panel further noted that definitions of "dumping" and of the "margin of dumping" apply throughout the Agreement, including under Article 9.3, and under Article VI:2 of the GATT 1994. It therefore, follows that the amount of anti-dumping duties assessed pursuant to those provisions couldn't exceed the margin of dumping as established for the "product as a whole". (Para 7.74-7.78)

The Panel carefully considered and assessed the arguments made by the parties. It noted that very same arguments that the US makes before the Panel were rejected by the AB in prior disputes. The Panel relied on findings in *US-Stainless Steel (Mexico)*, wherein the AB explained:

> "…the legal interpretation embodied in adopted Panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."

Following the objective assessment the Panel concluded that **the application by the USDOC of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth and sixth administrative reviews of the *Shrimp* order was inconsistent with US obligations under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. (Para 7.79-7.81)**

2. AD Agreement Articles 6.10, 9.2, 9.4, 6.8 and Annex II - "NME-Wide Entity" Rate

Viet Nam made claims with respect to what it terms the USDOC's "NME-wide entity rate practice". Viet Nam included within this practice: (i) the USDOC's presumption, in anti-dumping proceedings – including original investigations and administrative reviews – involving imports from NMEs, that all companies within the designated NME country are essentially operating units of a single, government-wide entity and the assignment of a single anti-dumping duty rate to that entity; and (ii) the manner in which this anti-dumping rate is determined, distinct from the separate rate, on the basis of facts available. Viet Nam also challenged the application of this NME-wide entity rate practice in the fourth, fifth, and sixth administrative reviews. (Para 7.82)

Viet Nam claimed that the "NME-wide entity rate practice" was a measure which may be challenged "as such" and inconsistent with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the AD Agreement.140 The US submitted that Viet Nam had failed to establish the existence of the NME-wide entity rate practice as a measure of general and prospective application that may be challenged "as such" under the Anti-Dumping Agreement. The US also asked the Panel to reject Viet Nam's claims of inconsistency. (Para 7.86)

"As Such" Claims

The Panel observed that neither the DSU nor the AD Agreement establishes criteria for determining when measures can be challenged "as such". The Panel elaborated that, while there is no threshold requirement that the measure challenged "as such" be of a certain type, the burden of establishing the existence of a rule or norm of general application – which rests on the party alleging that such a measure exists – might be different depending on the type of measure at issue. That burden could be more easily discharged when the measure at issue is set forth in a legislative act than in situations where the existence of the alleged measure is not expressed in a written document. The AB had explained that the burden is particularly high in the latter case. (Para 7.94 –7.97)

*(**Key Question:** Whether Viet Nam demonstrated, in casu that the alleged measure is a norm or rule of general and prospective application that can be challenged "as such" in the WTO dispute settlement system?)*

Viet Nam had challenged the NME-wide entity rate practice as an unwritten rule or norm, the Panel stated that written documents referred to by Viet Nam described the practice "to be used as relevant evidence in assessing the existence of the alleged measure, but were not themselves being challenged as measures." In this light, recalling the standard for establishing a norm or rule as it set out above in respect of the "as such" claim against USDOC's simple zeroing methodology, the Panel said it would consider *whether Viet Nam has established: "(i) [that] this practice or policy is '**attributable**' to the US, (ii) the '**precise content**' of this practice or policy, and (iii) that this practice or policy does have '**general and prospective application.**'* (Para 7.98)

Attributable Criteria

With regard to first criteria i.e., attributability the Panel found no controversy between the parties.

Precise Content Criteria

Viet Nam's argument regarding precise content criteria had two elements, (i) the application of a rebuttable presumption that, in NME countries, all companies belong to a single, NME-wide entity, and the assignment of a single rate to that entity; and (ii) the manner in which that rate is determined, in particular the use of facts available. The Panel said that it would examine these two elements separately. (Para7.99 – 7.100)

Viet Nam relied on Chapter 10 of the USDOC Antidumping Manual, entitled "Non-Market Economies". Upon perusal of the Manual the Panel was of the opinion that in anti-dumping proceedings involving NMEs, the USDOC applies a rebuttable presumption that all exporters in the NME country are part of a single NME-wide entity and assigns a single anti-dumping duty rate to all exporters who do not rebut this presumption by establishing that they operate, *de jure* and *de facto*, independently from the government with respect to their export activities. (Para 7.101 -7.104)

The Panel noted that Chapter 10 of the Antidumping Manual uses the terms "practice" or "methodology" when referring to the treatment of NMEs in anti-dumping proceedings. Further the US did not contest that the "practice" described in Chapter 10 of the Antidumping Manual is applied in all proceedings involving NME countries, neither it has provided a single instance of proceeding involving an NME where the USDOC did not start with the rebuttable presumption regarding the existence of an NME-wide entity and go on to assign to that entity a single anti-dumping duty rate. Thus, the Panel viewed "practice" or "methodology" in Chapter 10 as having a general and prospective application for the reason that it applies in all anti-dumping proceedings involving NMEs and makes it possible to anticipate the future conduct of the USDOC in such anti-dumping proceedings. The US submitted that the Antidumping Manual is a non mandatory instrument and, for this reason, cannot be challenged "as such". The Panel cited *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* to find that if a non-mandatory instrument can be found to be a measure of general and prospective application it can *a fortiori* constitute probative evidence of the existence of an unwritten measure of general and prospective application. (Para 7.106-7.109)

Viet Nam submitted Policy Bulletin 05.1 as further evidence that the NME-wide entity rate practice amounts to a measure of general and prospective application that can be challenged "as such". The Panel found that the Policy Bulletin 05.1 plainly stating that it will apply to "all" NME anti-dumping investigations initiated "on or after the date of publication" in the Federal Register, thus evidencing that it has "general" and "prospective" application. Viet Nam further contended that similar language can be found in every anti-dumping determination involving an NME country. The US submitted that Policy

Bulletin 05.1 applies only to original investigations, and moreover, only applies to investigations initiated after 5 April 2005. The Panel found that the evidence regarding general and prospective nature of this element of the alleged unwritten measure can be found in a number of statements made by the USDOC in the Notices issued under the *Shrimp* order. In light of forgoing analysis **Panel concluded that Viet Nam had established that, in anti-dumping proceedings involving NME countries, the USDOC starts with a rebuttable presumption that all companies within that NME country belong to a single, NME-wide entity and that a single rate was assigned to that entity, and, thus, to companies deemed to belong to that entity. (Para 7.110 – 7.122)**

The second element of the "precise content" criteria relates to the determination of the rate assigned to the NME-wide entity. Viet Nam submitted that the USDOC applies a punitive rate based on adverse facts available to the producers/exporters deemed to be part of the NME-wide entity. US highlighted Viet Nam's assertion that the USDOC "retains broad discretion on the method for calculating the NME-wide entity rate," thereby casting a doubt on the consistency of USDOC's practice. In that context, the Panel recalled that it "must not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, especially when it is not expressed in a written document." Thus the evidence cited by US and Viet Nam's admission regarding broad discretion concerning the method used to determine the NME-wide rate, lack of consistency in practice, the Panel concluded that Viet Nam had failed to establish the existence of any practice amounting to a rule or norm of general and prospective application. (Para 7.123- 7.130)

In sum, the Panel concluded **that Viet Nam had established that the USDOC's policy or practice whereby, in anti-dumping proceedings involving NMEs, it presumes that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity** amounts to a measure of general and prospective application which can be challenged "as such". However, Viet Nam **could not establish the existence of a USDOC practice with respect to the manner in which it determines the NME-wide entity rate, in particular concerning the use of facts available**, amounting to a measure of general and prospective application, and which can therefore be challenged "as such". (Para 7.131)

Whether the NME-wide entity rate practice was inconsistent with Articles 6.10 and 9.2 of the AD Agreement?

As far as the first element is concerned, Viet Nam had successfully established that the USDOC's policy or practice was a measure of general and prospective application which could be challenged "as such". Thus the Panel examined whether, as alleged by Viet Nam, that measure is inconsistent "as such" with Articles 6.10 and 9.2 of the AD Agreement. Article 6.10 provided that:

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

The Panel observed that according to AB in *EC – Fasteners (China)*, the use of the term "shall" in the first sentence of Article 6.10 indicated that the provision contained a mandatory rule to determine individual dumping margins for each known exporter or producer. The AB further "[did] not find any provision in the covered agreements that [allowed] importing Members to depart from the obligation to determine individual dumping margins only in respect of NMEs".

Article 9.2, provided that:

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis

> on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

The AB in *EC – Fasteners (China)*, observed that the first two sentences of Article 9.2 were of a mandatory nature. It noted the complementarily between Articles 6.10 and 9.2. It further observed that "[we] do not see how an importing Member could comply with the obligation in the first sentence of Article 9.2 to collect duties in the *appropriate* amounts in each case if, having determined individual dumping margins, it lists suppliers by name, but imposes country-wide duties." The Panel found the reasoning of the AB highly persuasive to the correct interpretation of those provisions and thus provided a proper legal standard for examination of Viet Nam's claims of inconsistency under Articles 6.10 and 9.2. (Para 7.143-7.149)

*(**Key Question:** Whether, under Articles 6.10 and 9.2, US was entitled to presume that all exporters within an NME belong to a single, NME-wide entity under the control of the government, and assign a single rate to that entity?)*

The Panel found that the USDOC's practice at issue established a presumption that individual exporters in NME countries were not entitled to an individual rate, unless they successfully demonstrate independence from the government with respect to their export activities. Such a practice ran directly counter to the obligation contained in Article 6.10 of the AD Agreement whereby an investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned". (Para 7.151-7.152)

US argued that depending on the facts of a given situation, an investigating authority might determine that legally distinct companies shall be treated as a single exporter or producer based on their activities and relationships. The Panel recalled *Korea – Certain Paper* wherein the Panel had found pursuant to Article 6.10, that separate legal entities in a sufficiently close structural and commercial relationship could justifiably be treated as a single exporter or producer to agree with submissions. However referring to AB in *EC – Fasteners (China)* (Para 363) the Panel clarified that an objective affirmative determination that entities are in such a close relationship had to be made on the basis of the record of the particular investigation. (Para 7.153-7.155)

The Panel found that the USDOC did not make an "objective affirmative determination" as to who is the known exporter or producer, but presumed from the start the existence of this exporter or producer in the form of a NME-wide entity. It was noted that USDOC "single entry determinations" pursuant to the "separate rate test" not only placed the burden on exporters to rebut the presumption that they were not independent from the State, but then it did not make a factual determination in that regard. The Panel noted another distinct "single entity test" that USDOC uses for "single entity determinations" (pursuant to a "single entity test") for purposes of calculating a dumping margin in both market economy and NME investigations. The Panel considered the existence of the single entity test as distinct from the separate rate test and viewed that the USDOC's treatment of the NME-wide entity as a matter entirely separate from the question of determining whether different exporters are so closely related that they constitute a single entity. (Para 7.156-7.157)

The Panel relied on the report of the AB in *EC – Fasteners (China)*, where it concluded that:

> "**placing the burden on NME exporters to rebut a presumption** that they are related to the State and to demonstrate that they are entitled to individual treatment **runs counter to**

> **Article 6.10**, which "as a rule" requires that individual dumping margins be determined for *each known exporter or producer*, and is inconsistent with Article 9.2 that requires that individual duties be specified by *supplier*. Even accepting in principle that there may be circumstances where exporters and producers from NMEs may be considered as a single entity for purposes of Articles 6.10 and 9.2, **such singularity cannot be presumed; it has to be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation**."

The Panel further rejected US arguments in regard to footnote 11 to Article 4.1(i) and Article 9.5 as those provision did not deal with the determination of dumping margins for producers/exporters, but with the definition of the domestic industry; the "producers" referred to are domestic producers. In respect of this issue the Panel found that the USDOC's policy or practice whereby it presumes, in antidumping investigations involving NMEs, that all companies belong to a single, NME-wide entity ,and assigned a single rate to that entity were inconsistent with the obligations contained in Articles 6.10 and 9.2 of the AD Agreement. (Para 7.158-7.169)

However before concluding the analysis the Panel examined a ***Key Question:*** *Whether Viet Nam's Accession Protocol provided a legal basis for the rebuttable presumption that, in Viet Nam, all companies are part of a single, Viet Nam-wide entity and should be assigned a single rate?*

The US argued that Viet Nam's Working Party Report provided a "legal and factual support" for treating multiple companies as part of a Viet Nam-wide entity for the purpose of determining a margin of dumping. Viet Nam on the other hand submitted that its Accession Protocol and Working Party Report provided that provisions of the GATT 1994 and the AD Agreement "shall apply" in anti-dumping proceedings involving exports from Viet Nam, subject to that one special rule, namely the right for an investigating authority to use an alternate methodology when calculating normal value. China as a third party supported this argument and was of the view that this understanding has been confirmed by the AB in *EC – Fasteners (China)* with regard to similar provision in Section 15 of China's Protocol of Accession. (Para 7.170-7.172)

The Panel perused the relevant provisions of the Accession Protocols, and proceeded to interpret treaty text pursuant to customary rules of interpretation, in particular Articles 31and 32 of the Vienna Convention. Upon reading of paragraph 255 of Viet Nam's Working Party Report, Panel confirmed that Article VI of the GATT 1994 and the AD Agreement apply in anti-dumping proceedings involving imports from Viet Nam, subject to the provisions contained in sub-paragraphs (a) and (d). The Panel further observed that the derogation provided under sub-paragraph (a) is a limited one, which only concerns the determination of normal value, and does not extend to the determination of export price, that similar to second *Ad* Note to Article VI:1 of the GATT 1994. The Panel relied on AB report in *EC – Fasteners (China)*, and agreed with China's submission that paragraph 255 comports with the AB reading of virtually identical provisions contained in Section 15 of China's Protocol of Accession. (Para 7.173-7.182)

US submitted arguments showing that Viet Nam was an NME. However, the Panel rejected it as "irrelevant" to the resolution of the legal question *whether the US is entitled to presume that, in Viet Nam, all companies belong to a single, Viet Nam wide entity, and should be assigned a single rate.* The Panel again relied on *EC – Fasteners (China)*, wherein AB observed that the economic structure of a WTO Member cannot be used to imply a legal presumption that has not been written into the covered agreements. Further rejecting additional arguments of US regarding "price comparability" as relating only to determination of normal value, the Panel concluded **that the USDOC's policy or practice whereby, in anti-dumping proceedings involving NMEs, it presumes that all companies belong to a single, NME-wide entity, and assigns a single rate to that entity was inconsistent "as such" with Article 6.10 and Article 9.2 of the Anti-Dumping Agreement. (Para 7.182-7.193)**

Whether the NME-wide entity rate practice was inconsistent with Articles 9.4, 6.8 and Annex II of the Anti-Dumping Agreement?

The Panel recalled Viet Nam had failed to establish that the USDOC's methodology used to calculate the NME-wide entity rate, in particular as it refers to the use of facts available, was a rule or norm that constitutes a measure of general and prospective application which could be challenged as such. This being the case the Panel found **that Viet Nam did not establish that the alleged measure was "as such" inconsistent with Articles 6.8 and 9.4, and Annex II of the AD Agreement. (Para 7.194)**

"As Applied" Claims

Viet Nam claimed that the Viet Nam-wide rate applied in the fourth, fifth and sixth administrative reviews under the *Shrimp* order is inconsistent with Articles 6.10, 9.2, 9.4, 6.8 and Annex II of the AD Agreement. The Panel recalled its earlier observations to sum up that the USDOC began with a rebuttable presumption that all shrimp exporters and producers in Viet Nam were operating units of a single, Viet Nam-wide entity. Exporters with separate rate status which were not selected as mandatory respondents received the "separate rate", a rate based on the simple or weighted-average of the rate of the mandatory respondents in each review. Vietnamese companies which did not successfully establish independence from the Vietnamese Government, or which did not apply for separate rate status, were assigned the Viet Nam-wide rate of 25.76% in each review. (Para 7.195, 7.200)

Whether the Viet Nam-wide entity rate applied in the administrative reviews at issue was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement?

The Panel recalled its finding pursuant to Article 6.10, that investigating authorities had an obligation to determine individual margin of dumping for each known producer/exporter. Pursuant to Article 9.2, individual anti-dumping duties must be specified for each supplier, except where this was impracticable. The Panel observed, having concluded that the USDOC's policy or practice as inconsistent "as such" with Articles 6.10 and 9.2, its application could be found consistent with those same two provisions. Moreover, Panel noted that its finding as regard to paragraph 255 of Viet Nam's Working Party Report applies *mutatis mutandis* to its consideration of Viet Nam's "as applied" claims. It concluded **that the application by the USDOC, in the fourth, fifth and sixth administrative reviews, of a presumption of the existence of a Viet Nam-wide entity and application of a single rate to that entity was inconsistent Articles 6.10 and 9.2 of the Anti-Dumping Agreement. (Para 7.203-7.208)**

Whether the Viet Nam-wide entity rate applied in the administrative reviews at issue was inconsistent with Article 9.4 of the Anti-Dumping Agreement?

Article 9.4 provides, in relevant part:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers … provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

Pursuant to Viet Nam's argument that in each administrative review USDOC conducted a limited examination within the meaning of Article 6.10 and the text of Article 9.4 required that, where an investigating authority had limited its examination, it must calculate an anti-dumping duty for all companies not individually investigated that is no greater than the weighted average margin of dumping of the selected companies, excluding rates that are zero, *de minimis* or based on facts available. Panel noted the link between Articles 6.10 and 9.4 and observed AB conclusion in *US – Hot Rolled Steel*, that Article 9.4 does not provide for a method to calculate an "all others rate", but establishes a "ceiling" for

any such rate that may be applied to unexamined producers/exporters noteworthy. (Para 7.209-7.210, 7.215-7.216)

(***Key Question:*** *Whether, in the three administrative reviews at issue, the US was required by Article 9.4 to ensure that the duty rate applied to the Viet Nam wide entity, and to any individual companies deemed to be part of that entity, did not exceed the ceiling calculated pursuant to that provision?)*

The preliminary and final determinations show that each review was conducted with respect to the companies for which the review had been initiated, i.e. including companies deemed to be part of the Viet Nam-wide entity. Further the evidence submitted including the notices of initiations and the requests underlying the administrative reviews showed that the USDOC did not request information from the Viet Nam-wide entity or any of the companies deemed to be part of that entity in any of the reviews at issue to individually examine under Article 6.10. In each of the three administrative reviews at issue, the Viet Nam-wide entity (and all of the companies deemed to be part of that entity in each review) was assigned a rate of 25.76%. Thus the Panel opined that pursuant to Article 9.4, rate applied to the Viet Nam wide entity and its constituent companies exceeds the ceiling applicable under Article 9.4. Therefore the Panel concluded that **the duty rate applied to the Viet Nam-wide entity and the companies deemed to be part of that entity in the fourth, fifth and sixth administrative reviews was inconsistent with Article 9.4 of the Anti-Dumping Agreement. (Para 7.219-7.223)**

> *Whether the Viet Nam-wide entity rate applied in the administrative reviews at issue was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement?*

Viet Nam refers *inter alia* to the AB statement in *US –Zeroing (EC)*, that non-investigated exporters cannot, by definition, be "interested parties" pursuant to Article 6.8. According to Viet Nam, in the three administrative reviews at issue, the USDOC applied a rate based on facts available with an adverse inference to companies which were not individually investigated and from which no necessary information was requested, thus acting inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement. (Para7.224)

Although both parties agreed that the determination was on the basis of facts available, there is disagreement as to whether, in the fourth, fifth and sixth administrative reviews, the USDOC made a determination on the basis of facts available within the meaning of Article 6.8 of the AD Agreement. The Panel noted that the rate calculated for the Viet Nam-wide entity during the second administrative review appears to have been determined based on facts available. In contrast, the evidence on the record showed that, in the fourth, fifth and sixth administrative reviews, the USDOC did not resort to facts available, i.e. it did not make any "determination[], affirmative or negative … on the basis of the facts available". The Panel reading of language of Article 6.8 showed the Article imposes disciplines with respect to when, and under what conditions, "preliminary and final determinations, affirmative or negative may be made on the basis of facts available". Panel noted that *US – Shrimp (Viet Nam)* was faced with a similar issue. Disagreeing with the reasoning of the panel in *US – Shrimp (Viet Nam)*, the Panel took the view that continuing to apply a rate determined in an earlier proceeding is not the same as making a determination in the later proceeding, and, therefore, does not give rise to a possible violation of Article 6.8. (Para 7.230-7.235)

Given the view, Panel found **that Viet Nam had failed to establish that the rate applied to the Viet Nam-wide entity in the fourth, fifth and sixth administrative review was inconsistent with Article 6.8 and Annex II of the AD Agreement. (Para 7.236)**

3. AD Agreement Articles 1, 9.2, 9.3, 11.1 and 18.1 - URAA Section 129(c)(1)

Viet Nam claimed that Section 129(c)(1) of the URAA was "as such" inconsistent with:

- Article 1 of the AD Agreement, to the extent that Section 129(c)(1) resulted in the application of an anti-dumping measure despite the duty having been imposed pursuant to an investigation conducted in violation of the GATT 1994 and the AD Agreement;

- Article 9.2 of the AD Agreement to the extent that Section 129(c)(1) resulted in the continued collection of anti-dumping duties at a level in excess of the "appropriate amount" (i.e., an amount determined consistently with the terms of the AD Agreement) on prior unliquidated entries;

- Article 9.3 of the AD Agreement to the extent that Section 129(c)(1) resulted in the continued collection of anti-dumping duties at a level exceeding the margin of dumping established consistently with Article 2 of the AD Agreement on prior unliquidated entries;

- Article 11.1 of the AD Agreement to the extent that Section 129(c)(1) resulted in the continued collection of anti-dumping duties with respect to prior unliquidated entries pursuant to anti-dumping duty orders that were revoked;

- Article 18.1 of the AD Agreement, to the extent that Section 129(c)(1) resulted in the continued collection of duties amounts pursuant to an action that was performed without the authority provided in the GATT 1994. (Para 7.237)

Factual Background

The Section 129 of the URAA (codified at 19 U.S.C. § 3538) set forth a mechanism with respect to the implementation of DSB recommendations and rulings concerning anti-dumping and countervailing duty actions. Section 129(c)(1), the specific sub-paragraph challenged by Viet Nam, addressed the question of when revised determinations made pursuant to that mechanism ("Section 129 determinations") take effect. In practice, the "implementation" of a Section 129 determination could result in: (i) the revocation of the order; or (ii) a change in the dumping calculation resulting in the USDOC modifying the cash deposit rates that apply to entries of the subject product from the date of implementation going forward. Viet Nam referred to cases in the first situation as "revocation" cases and cases in the second as "modification" cases. Although not challenged by Viet Nam, the Panel found Section 123 of the URAA as relevant in consideration of Viet Nam's claims. Section 123(g)(1) established a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practice to render them consistent with DSB recommendations and rulings. Also of relevance is the findings of Panel in *US – Section 129(c)(1) URAA*, wherein Panel considered and rejected claims by Canada that are similar to the claims of Viet Nam. (Para 7.238-7.242)

Analysis

The Panel began its analysis with a factual question of *whether Viet Nam had established that Section 129(c)(1) acts as a legal bar – or precludes – implementation of DSB recommendations and rulings with respect to prior unliquidated entries.* If it found so then the Panel would analyze *whether that results in an inconsistency with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement*. Further Panel highlighted the fact that Viet Nam's challenge is limited to Section 129(c)(1) and therefore Panel would not consider *whether other provisions of US law, by themselves or in combination with Section 129(c)(1), preclude US authorities from taking actions to comply with DSB recommendations and rulings with respect to prior unliquidated entries*. (Para 257-7.258)

The text of Section 129(c)(1) set out when revised determinations under Section 129 mechanism take effect, the application of those determinations "…with respect to unliquidated entries of the subject merchandise … that are entered, or withdrawn from warehouse, for consumption [shall apply] *on or after*" the implementation date. As a result the Panel agreed with the conclusion reached by the *US – Section 129(c)(1) URAA* panel that Section 129(c)(1) "does not, by its express terms, require or preclude

any particular action with respect to prior unliquidated entries". It necessarily follows that Section 129(c)(1) could not be found to preclude implementation of DSB recommendations and rulings with respect to such prior unliquidated entries. Panel noted the *US – Section 129(c)(1) URAA* panel's view because Section 129(c)(1) limits the application of Section 129 determinations to entries that take place on or after the implementation date, prior unliquidated entries would remain subject to other provisions, however recalling its mandate it limited examining the WTO-consistency of Section 129(c)(1). (Para 7.259-7.260)

Viet Nam supported its interpretation with SAA, an authoritative statement on the interpretation of the URAA, adopted by the US Congress at the time of the adoption of the latter, wherein it noted that "[u]nder 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of the USTR's direction would remain subject to potential duty liability". The Panel rejected the claim stating the SAA merely confirmed their interpretation that implementation through Section 129 determinations only had effects with respect to entries that were made after the implementation date. (Para 7.261-7.262)

Viet Nam further relied on USDOC practice to demonstrate that it "reveals a systematic and consistent refusal by the USDOC to issue liquidation instructions that would extend the results of its Section 129 determinations to prior unliquidated entries". The Panel agreed that the application of Section 129(c)(1) to date did suggest the effect of Section 129 determination typically has not extended to prior unliquidated entries. However Panel failed to see how the "pattern" alleged by Viet Nam would, in and of itself, demonstrate that the USDOC legally *could not* "extend the benefits of implementation" (to use Viet Nam's formulation) to prior unliquidated entries, particularly in face of the fact that Viet Nam did notestablish that the US Government is precluded from doing so *by Section 129(c)(1)*, which was the only provision of US law it had challenged. Hence, the Panel could not agree with Viet Nam's assertion that the "consistent pattern" of the US Government not extending the effect of Section 129 determinations to prior unliquidated entries suggests "more than just a practice, but recognition that Section 129 demands such treatment as a matter of U.S. law". Viet Nam also argued that decisions of US courts support its argument that Section 129 precludes implementation with respect to prior unliquidated entries. Upon reading the descriptions of rulings cited by Viet Nam the Panel suggested that they are consistent with their reading of Section 129(c) as having no effect on prior unliquidated entries and that Section 129 has limited effects. (Para 7.263-7.264, 7.267-7.269)

The Panel noted US assertion that the USDOC can "implement" DSB recommendations and rulings with respect to prior unliquidated entries: (i) US Congress may adopt new legislation or amend existing legislation pursuant to a WTO consistent methodology; (ii) US Administration can use Section 123 to amend a WTO-inconsistent USDOC practice; and (iii) USDOC could adopt a WTO-consistent methodology in a subsequent administrative review. Moreover the Panel was satisfied with the instances cited and evidence submitted by US to confirm the view that Section 129 did not itself preclude the US from implementing adverse DSB recommendations and rulings with respect to prior unliquidated entries. (Para 7.265-7.266)

Having concluded that Viet Nam had failed to establish its factual allegation that Section 129(c)(1) precludes implementation with respect to prior unliquidated entries, the Panel did not consider Viet Nam's arguments regarding the consistency of Section 129(c)(1) with the provisions of the AD Agreement cited by Viet Nam. The Panel thus concluded **that Viet Nam could not establish that Section 129(c)(1) of the URAA was "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement. (Para 7.271-7.272)**

4. AD Agreement Articles 11.3 and 17.6 - Likelihood-of-Dumping Determination (Sunset Review)

Viet Nam claimed that USDOC's affirmative likelihood-of-dumping determination in the first sunset review was inconsistent with Articles 11.3 and 17.6 of the Anti-Dumping Agreement. It challenged:

- the USDOC's reliance on WTO-inconsistent margins of dumping, which Viet Nam argued was inconsistent with Article 11.3 and constituted an improper establishment of facts and prevented an unbiased and objective evaluation of the facts, inconsistent with that provision and Article 17.6; and

- the USDOC's reliance on a presumption with respect to the decline in import volumes, as opposed to other factors, in reaching its likelihood-of-dumping determination, which Viet Nam argued was not supported by the facts and is an improper evaluation of changes in volumes based on the facts of the review, inconsistent with Articles 11.3 and 17.6.

(Para 7.273)

Claim under Article 17.6 AD Agreement

The Panel observed that although Viet Nam claimed inconsistency with Articles 11.3 and 17.6 of the AD Agreement, it appeared to allege only violation of Article 11.3. Upon reading of the Article Panel noted that Article 17.6 set forth the relevant standard of review applicable to a Panel's examination of the consistency with the Agreement of a Member's anti-dumping measures and it does not, in itself, impose obligations upon investigating authorities. For this reason, **insofar as Viet Nam might be making an independent claim of violation under that provision, Panel rejected the claim. (Para 7.300-7.302)**

Claim under Article 11.3 AD Agreement

Turning to Article 11.3 Panel recalled AB in *US – Corrosion-Resistant Steel Sunset Review*, guidance in making "likelihood" determination indicating that while making a determination pursuant to Article 11.3, investigating authorities "must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated". Of direct relevance to Viet Nam's claim, the Panel agreed with interpretation of Article 11.3 in prior disputes concluding that "while there is no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in considering likelihood-of dumping, should an investigating authority choose to rely upon dumping margins in making a likelihood-of-dumping determination, the calculation of those margins must conform to the disciplines of the relevant provisions of the covered agreements." (Para 7.303-7.306)

The parties did not dispute the fact that USDOC relied, in its likelihood-of-dumping determination, on certain margins that had been calculated with zeroing in the fourth administrative review. The Panel recalled its findings that margins based on zeroing are inconsistent with Article 9.3 of the AD Agreement and VI:2 of the GATT 1994. (Para 7.307)

Viet Nam asserted that the separate rates applied in each of the proceedings are inconsistent with the US obligations. Viet Nam relied, in particular on the findings of the US Court of International Trade in *Amanda Foods* and on the findings of the *US – Shrimp (Viet Nam)* panel, which found that the separate rates applied in the second and third administrative reviews were inconsistent with, respectively, US law and Article 9.4. The Panel responded by stating that ruling by a domestic court of a Member, applying the domestic law of that Member, couldn't establish an inconsistency with WTO obligations and reiterated its finding above and expressed it reluctance to incorporate, without more scrutiny of the facts and parties' arguments, the factual findings reached by a Panel in a prior dispute. (Para 7.308)

Viet Nam attempted to establish the WTO-inconsistency of the separate rate applied in the first three administrative reviews independently. The Panel noted that all margins for mandatory respondents in the first, second and third administrative reviews were either zero, *de minimis*, or based on facts available. The Panel expressed sympathy for Viet Nam's argument highlighting *lacuna* in Article 9.4 identified in prior Panels and the AB reports regarding how to calculate the relevant ceiling in such situations. The Panel called for a more developed discussion on whether the use of margins calculated with zeroing to derive a rate which was subject to the Article 9.4 ceiling results in an inconsistency with that provision. Because it was ultimately not necessary for Panel to determine the WTO-consistency of all the rates relied

upon by the USDOC, **it did not reach a final conclusion as to whether the separate rates applied in the four first administrative reviews was determined consistently with the provisions of the Agreement. (Para 7.309)**

Finally, the USDOC relied on the rate of 25.76% assigned to the Viet Nam-wide entity in the first four administrative reviews. The Panel already found the fourth administrative review to be inconsistent with Articles 6.10, 9.2, and 9.4. In sum, in its likelihood-of-dumping determination, the USDOC relied on certain WTO inconsistent margins of dumping or rates, in particular: (i) the margins of dumping for the mandatory respondents in the fourth administrative review which were calculated with zeroing and therefore inconsistent with Article 9.3 of the AD Agreement and VI:2 of the GATT; and (ii) the Viet Nam-wide entity rate applied in the fourth administrative review, which were inconsistent with Articles 6.10, 9.2 and 9.4. (Para 7.310-7.311)

The US considered that irrespective of the USDOC's reliance on dumping margins that Viet Nam alleged are WTO inconsistent, the determination stands on the basis of: (i) the alleged admission before the USDOC that some dumping continued after the imposition of the order; (ii) the presumably WTO-consistent margins for the two mandatory respondents in the first administrative review; and (iii) the USDOC's finding that import volumes fell after the initiation of the original investigation and did not return to pre-investigation levels.

Here, the Panel agreed that an investigating authority's reliance on WTO inconsistent factors might not always be fatal to the consistency of a likelihood-of-dumping determination with Article 11.3, if there are separate independent bases for a determination. The panel however, found it clear from the determination itself that the USDOC's consideration of the existence of dumping rested upon all the different margins of dumping. The determination contains no indication that the USDOC considered that the rate applied to two uncooperative companies and the declining import volumes constituted an independent basis or bases for the USDOC's likelihood-of-dumping determination or that the determination rested on such basis or bases. Hence the Panel was unable to conclude in the present instance that the USDOC's determination rested upon WTO-consistent bases that were separate and independent from the WTO-inconsistent margins and rates upon which it relied. The Panel reached a similar conclusion with respect to the US argument concerning the USDOC's evaluation of import volumes. (Para 7.316-7.318)

Given that USDOC's failure to carry out an unbiased and objective evaluation of the facts pertaining to the volume of imports, and for disregarding other factors in its analysis, the Panel did not consider it necessary or appropriate to address Viet Nam's argument that the USDOC's likelihood-of-dumping determination is inconsistent with Article 11.3. In light of the foregoing, Panel found **that the USDOC's likelihood-of-dumping determination in the first sunset review was inconsistent with the US obligations under Article 11.3 of the AD Agreement. (Para 7.319-7.320)**

5. AD Agreement Articles 11.1 and 11.2 - Company-Specific Revocations in Reviews

Viet Nam claimed that the US acted inconsistently with Articles 11.1 and 11.2 of the AD Agreement due to USDOC's refusal to revoke the *Shrimp* antidumping order in the third, fourth, and fifth administrative reviews with respect to the Vietnamese producers/exporters that submitted these requests pursuant to Section 751(a) of the Act and Section 351.222(b) of the USDOC Regulations. Viet Nam challenged the use of WTO-inconsistent margins of dumping in determining whether the producer/exporter at issue had ceased dumping for at least three consecutive years. With respect to others, Viet Nam challenged the USDOC's refusal to revoke the order in respect of producers/exporters which it was not individually examining in the review at issue. (Para 7.321, 7.328, 7.336)

Jurisdictional Issue

The Panel began its analysis with jurisdiction question of whether the USDOC's treatment of Fish One's request for revocation in the third administrative review fell within the Panel's terms of reference. The US objected that the third administrative review was not included in either Viet Nam's request for

consultations or its panel request. The Panel noted that Viet Nam's consultation request included only the USDOC's treatment of requests for company-specific revocations in the context of the fourth, fifth, and ongoing future administrative reviews. Moreover, the last paragraph added by Viet Nam in the consultation request excluded the possibility for Viet Nam to include within the panel request the third administrative review as a measure at issue. The Panel concluded that a claim in respect of such actions would have impermissibly expanded the scope of the dispute. That being the case, the USDOC's determination not to revoke the *Shrimp* order with respect to Fish One in the third administrative review did not fell within their terms of reference. (Para 7.356 -7.361)

General considerations with respect to the interpretation

Article 11 of the AD Agreement concerns the "Duration and Review of Anti-Dumping Duties and Price Undertakings". Articles 11.1 to 11.5 are directly relevant to Viet Nam's claim that Article 11.1 set forth an obligation which was operationalised in Articles 11.2 and 11.3. Panel noted that to be the principle in prior decisions and focused its evaluation on the language of Article 11.2; drawing on the context provided by, *inter alia*, Article 11.1, where relevant. (Para 7.362-7.363)

The Panel reviewed relevant findings by prior Panels and the AB and in broad terms explained that Article 11.2 provided that if an investigating authority: (i) receives a request from an interested party; (ii) after a reasonable period of time has elapsed; (iii) requesting it to examine one of the three matters specified in the second sentence of Article 11.2 (need for the continued imposition of the duty on the basis of dumping, injury, or both); and (iv) accompanied by positive information substantiating the need for a review, then the authority must undertake a review of the need for the continued imposition of the duty. While the authorities must undertake the review where these conditions were met, Article 11.2 didn't specify whether the review must be of the duty as a whole (i.e. on an order-wide basis) or of the duty as it applied to an individual producer/exporter (i.e. on a company-specific basis). (Para 7.368)

The Panel viewed the term "duty" as it is used in Article 11.2 to mean either a company-specific duty or an order-wide duty. The Panel drew a distinction between the interpretation by AB in *US – Corrosion-Resistant Steel Sunset Review* (paras. 149-150) of term "duty", as it is used in Article 11.3, to refer to the duty as a whole, on an order-wide basis, according to Panels view the term "duty" in Article 11.2 need not be understood identically as it is in Article 11.3. The Panel noted the following reasons: (i) although Articles 11.2 and 11.3 both implemented the general "necessity" requirement contained in Article 11.1, the two provisions served different purposes, and established different mechanisms to implement those requirements; (ii) reference to "interested parties" in Article 11.2 and the use of term "dumping" impose obligations on the authorities with respect to individual producers/exporters and allowed an interested party to request an examination limited to the question whether the continued imposition of the duty is necessary to offset dumping and; (iii) the title of Article 11 referred to price undertakings and that Article 11.5 states that Article 11.2 and the other paragraphs of Article 11 "[should] apply *mutatis mutandis* to price undertakings accepted under Article 8. (7.369-7.373)

In light of Panel's understanding of the term "duty" in Article 11.2, it considered that an authority had some – but not unlimited – discretion in deciding whether to undertake a review on an order-wide or on a company-specific basis. That discretion was fettered by the right of an interested party to request an examination of certain matters pursuant to the second sentence of Article 11.2. The situation could be different in each case and would depend on both the specific request made by the interested party and the evidence submitted by that party substantiating the need for a review. It further clarified that in any event, while Article 11.2 did not specify in what circumstances an authority should undertake a review on a company-specific basis and in what circumstances it should undertake a review on an order-wide basis. However, it did impose an obligation on the authority to undertake a review of the need for the continued imposition of the duty and to make a determination when an interested party submitted a request meeting the requirements set therein. (Para 7.376)

With these general considerations in mind, Panel examined the claim made by Viet Nam with respect to the revocation requests presented by Vietnamese producers/exporters in the fourth and fifth administrative reviews. The Panel decided to examine *whether the revocation requests submitted by Vietnamese producers/exporters in the administrative reviews at issue satisfied the requirements of Articles 11.2*.

Article 11.2 imposes an obligation on an authority to conduct a review of the need for the continued imposition of the duty where the following conditions are met:

- a request is submitted by an interested party;
- after a reasonable period of time has elapsed;
- requesting that the investigating authority examine one of the three matters specified in the second sentence of Article 11.2; and
- the request is accompanied by positive information substantiating the need for a review.

(Para 7.378)

On facts, the Panel observed that a number of Vietnamese producers/exporters submitted requests for revocation in the fourth and fifth administrative reviews, and they by virtue of the definition of that term in Article 6.11, an "interested party", satisfying the first element. The panel also observed that requests were submitted after lapse of reasonable period of time, thereby satisfying the second element. The Panel was also satisfied with third element in so as the requests that were submitted qualify as requests that the US authorities "examine whether the continued imposition of the duty is necessary to offset dumping" i.e., the first type of examination which may be requested by an interested party under Article 11.2. Finally, as required under Section 351.222 of the USDOC Regulations, each request asserted, and attached certifications to the effect that, the company no longer engaged in dumping, thereby meeting the requirement that the request be accompanied by positive information substantiating the need for a review. (Para 7.379-7.382)

On the basis of the foregoing, Panel viewed that each of the requests submitted by Vietnamese producers/exporters in the context of the fourth and fifth administrative reviews **constituted a request to the USDOC for it to examine "*whether the continued imposition of the duty is necessary to offset dumping" within the meaning of Article 11.2*." (Para 7.383)**

The Panel next considered *whether the USDOC's treatment of requests for revocation by Vietnamese producers/exporters not individually examined was inconsistent with Articles 11.1 and 11.2.*

Panel recalled the two proceedings at issue and found the evidence to clearly indicating that the USDOC's decisions not to revoke the order with respect to any of the requesting companies was based solely on the fact that the producers/exporters at issue were not being individually examined. The US argued that the Article 6.10 "limited examination" exception applied in the context of Article 11.2 reviews. The Article 6.10 provided that "[i]n cases where the number of exporters, producers, importers or types of products involved is so large" as to make such a determination of an individual margin of dumping for each known producer/exporter impracticable, the authorities might limit their examination pursuant to one of two methods. Rejecting such arguments the Panel said there is no indication that the USDOC considered whether – or determined that – initiating the reviews sought by Vietnamese producers/exporters were impracticable, rather, it preconditioned the review on the requesting producer/exporter if they had been selected for individual examination in the corresponding administrative review. Moreover, by requiring that only companies selected for individual examination were eligible to obtain a company-specific revocation, the USDOC imposed an additional condition, not foreseen under Article 11.2, on the initiation of reviews under that provision. The Panel also rejected US argument about existence of alternative mechanism under US Law as irrelevant and said an authority cannot decline to conduct a review under one mechanism, and justify that refusal on the basis that the interested party requesting it could have used another mechanism but did not. (Para 7.384-7.390)

On the basis of the above, the Panel **found that in its treatment of the requests for revocation submitted by Vietnamese producers/exporters that were not being individually examined, the USDOC acted inconsistently with the US obligations under Article 11.2 of the AD Agreement**. **(Para 7.391)**

> *Whether the USDOC's determination not to revoke the order for certain Vietnamese producers/exporters on the basis that it had calculated a positive margin of dumping for these producers/exporters was inconsistent with Articles 11.1 and 11.2?*

The Panel recalled its finding in the sunset review section that if an authority had decided to rely on margins of dumping in conducting its analysis in an Article 11.3 sunset review, those margins of dumping must be established consistently with the provisions of the Agreement. The Panel noted that the evidence had established that in the fourth administrative review, the USDOC determined not to revoke the *Shrimp* order with respect to Minh Phu on the basis that it had calculated a dumping margin for that producer/exporter. Consequently, as this dumping margin was calculated with simple zeroing, and for that reason, was contrary to Article 9.3 of the AD Agreement, as well as with Article VI:2 of the GATT 1994. Thus, the USDOC's determination not to revoke the order with respect to Camimex in the fifth administrative review was inconsistent with Article 11.2 of the AD Agreement.

On the basis of the foregoing, the Panel found that the US acted inconsistently with Article 11.2 of the AD Agreement as a result of the USDOC's reliance on WTO inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Minh Phu, and in its determination, in the fifth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Camimex. In light of those findings, and in the light of Viet Nam's argument that Article 11.2 operationalised the general principle set forth under Article 11.1, The Panel **did not consider it necessary to make findings under Article 11.1 of the AD Agreement.**

III. CONCLUSIONS AND RECOMMENDATION

For the reasons set forth in this Report, the Panel concluded:

- Viet Nam had failed to establish that the simple zeroing methodology as used by the USDOC in administrative reviews was a measure of general and prospective application which could be challenged "as such". Therefore, the Panel found Viet Nam had not established that the USDOC's simple zeroing methodology in administrative reviews was inconsistent "as such" with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994;

- The US acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order;

- The practice or policy whereby, in NME proceedings, the USDOC presumed that all producers/exporters in the NME country belong to a single, NME-wide, entity and assigned a single rate to these producers/exporters, was "as such" inconsistent with the US obligations under Articles 6.10 and 9.2 of the AD Agreement;

- US acted inconsistently with its obligations under Articles 6.10 and 9.2 of the AD Agreement as a result of the application by the USDOC, in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam wide, entity and assignment of a single rate to that entity;

- Viet Nam had failed to establish the existence of a measure with respect to the manner in which the USDOC determines the NME-wide entity rate, in particular concerning the use of facts available. Therefore, the Panel found that Viet Nam could not establish that the alleged measure was "as such" inconsistent with Articles 6.8 and 9.4, and Annex II of the AD Agreement;

- US acted inconsistently with Article 9.4 of the AD Agreement as a result of the application to the Viet Nam-wide entity of a duty rate exceeding the ceiling applicable under that provision in the fourth, fifth and sixth administrative reviews under the *Shrimp* anti-dumping order;

- Viet Nam had failed to establish that the rate applied to the Viet Nam-wide entity in the fourth, fifth and sixth administrative reviews was inconsistent with Article 6.8 and Annex II of the AD Agreement;

- Viet Nam had failed to establish that Section 129(c)(1) precludes implementation, with respect to prior unliquidated entries, of DSB recommendations and rulings. Therefore the Panel found Viet Nam had not established that Section 129(c)(1) was "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement;

- US acted inconsistently with Article 11.3 of the AD Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review;

- US acted inconsistently with Article 11.2 of the AD Agreement in the fourth and fifth administrative reviews as a result of its treatment of request for revocation made by certain Vietnamese producers/exporters that were not being individually examined. The Panel did not make any findings with respect to Viet Nam's corresponding claim under Article 11.1 of the Anti-Dumping Agreement;

- US acted inconsistently with Article 11.2 of the AD Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* antidumping order with respect to Minh Phu, and with respect to its determination, in the fifth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Camimex. The Panel did not make any findings with respect to Viet Nam's corresponding claim under Article 11.1 of the AD Agreement.